

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR  
WASHINGTON, D.C.

DATE: November 20, 1990  
CASE NO. 89-JTP-20

IN THE MATTER OF

LAKE CUMBERLAND COMMUNITY  
SERVICES ORGANIZATION,

COMPLAINANT,

**v.**

U.S. DEPARTMENT OF LABOR,

**RESPONDENT,**

AND

KENTUCKY FARMWORKER PROGRAMS, INC.,

PARTY-IN-INTEREST.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

BACKGROUND

This case arises under the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. § 1501-1781 (1982), and the regulations issued thereunder at 20 C.F.R. Parts 629 and 633 (1990) and 29 C.F.R. Part 17 (1990).

On September 2, 1988, the United States Department of Labor (Department or DOL) published a notice of invitation to public agencies and private nonprofit organizations to submit to DOL preapplications and funding applications to provide training and employment services to migrant and seasonal farmworkers (MSF)

under JTPA. <sup>1/</sup> Both the Complainant, Lake Cumberland Community Services organization (Lake Cumberland), and the **Party-in-Interest**, Kentucky Farmworker Programs, Inc. (KFP), which was the incumbent service provider, applied for grants as service providers under JTPA Section 402, 29 U.S.C. § 1672, for the State of Kentucky. The Grant Officer selected KFP as the grantee for the Program Year (PY) 1989. <sup>2/</sup> On May 2, 1989, Lake Cumberland appealed its nonselection as grantee, pursuant to Section 166(a), JTPA, 29 U.S.C. § 1576(a), and 20 **C.F.R. § 629.57(a)**. KFP was added as a party to the proceeding on December 13, 1989, with full privileges as a participant. In the Matter of Lake Cumberland Community Services Organization v. U.S. Department of Labor and Kentucky Farmworker Programs, Inc., Case No. 89-JTP-20, Administrative Law Judge (**ALJ**) Rudolf L. Jansen, Decision and Order (D. and O.) issued June 14, 1990, **slip op.** at 2.

After a hearing and various submissions by the parties, the **ALJ** determined that the Grant Officer's selection of KFP as the Kentucky MSF program grantee "was not made in accordance with the law since the applicant [KFP] was ineligible for consideration due to its having failed to comply with the applicable filing deadlines." D. and O. at 11. The **ALJ** then ordered that Lake

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<sup>1/</sup> Job Training Partnership Act: Migrant and Seasonal Farmworker Programs; Preapplications for Federal Assistance. and Solicitation for Grant Application, 53 Fed. Reg. 34,178 (1988).

<sup>2/</sup> Pursuant to the notice, grantees selected for PY 1989 would not have to **recompete** for funding for PY 1990, provided applicable regulatory requirements were met, an acceptable training plan was submitted and funds were available. 53 Fed. Reg. 34,181; 29 U.S.C. § 1672(c)(2).

Cumberland be immediately granted the relief in 20 C.F.R. § 633.205(e), providing that a nonselected applicant which successfully appeals its nonselection is to be selected within 90 days of the **ALJ's** decision.

The Grant Officer and KFP timely excepted to the **ALJ's** decision, and on July 11, 1990, I asserted jurisdiction and stayed the decision of the **ALJ**. Thereafter Lake Cumberland moved (and later renewed its motion) that the order asserting jurisdiction be modified to lift the stay of the **ALJ's** decision of June 14, 1990, and to permit the "switchover" procedure, whereby Lake Cumberland would be substituted for KFP, to go forward. <sup>3/</sup> My Order of September 21, 1990, denied these motions <sup>4/</sup>, noting that 29 C.F.R. § 633.205(e) -- the regulation pertaining to implementing an **ALJ's** decision favorable to a nonselected applicant who successfully appeals the Grant Officer's designation of another applicant -- applies only if the **ALJ's** decision is a final adjudicatory act. My July 11 order stayed the **ALJ's** decision pending my final determination, embodied in this Final Decision and Order which is the final administrative adjudicatory act. The Act permits Secretarial review of **ALJ** determinations, 29 U.S.C. § 1576(b), and it controls all JTPA regulations including Section 633.205(e).

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<sup>3/</sup> Complainant's Motion to Enforce Regulations Requiring Switchover, dated July 30, 1990; Complainant's Renewed Motion to Enforce Regulations Requiring Funding Switchover, dated September 11, 1990.

<sup>4/</sup> Sec. Order Denying Complainant's Motion and Renewed Motion to Enforce Regulations Requiring Funding Switchover.

DISCUSSION

The issue before me is the **ALJ's** determination that KFP was not an eligible applicant for the PY 1989 MSF grant because it failed to comply with one filing requirement of the Department's September 2, 1988, Notice and Invitation for MSF Grant Applications. I disagree with the **ALJ's** analysis supporting his determination, and reverse his decision.

The Notice has four major elements. The third and fourth elements are entitled "**Part II - Preapplication for Federal Assistance**" and "**Part III - Solicitation for Grant Application**", respectively. There is no issue in this case concerning the applicability of these two parts of the notice to the grant process, and there is no dispute that KFP complied with the filing deadline requirements for its submissions to the Grant Officer.

What is in dispute is the applicability of certain language in the first element which is the preamble of the Notice, and whether that language is mandatory regarding certain requirements in the second element. The preamble provides a brief overview of the Notice. A "**Dates**" section establishes the deadlines for preapplications and applications, and states that "**no** exception to the mailing and hand-delivery conditions set forth in this notice will be granted. Preapplications and applications not meeting the conditions set forth in this notice will not be accepted." The third section provides the name and address of the Grant Officer to whom the preapplications and applications

must be mailed or delivered. It does not mention any other addressee.

The second element of the Notice, entitled "Part I - Introduction," provides background information on regulations pertaining to MSF programs and grant administration, and includes a section headed Comments From the States which provides:

Executive Order 12372, "Intergovernmental Review of Federal Programs," and the implementing regulations at 29 C.F.R. Part 17, are applicable to this program. Pursuant to these requirements, in States which have established a consultation process expressly covering this program, applications shall be provided to the State for comment. Since States may also participate as competitors for this program, applications shall be submitted to the State upon the deadline for submission to the DOL. 20 C.F.R. **§ 633.202(d)**. <sup>5/</sup>

The Comments section continues by specifying a four step timeframe to be followed for the State's comments concerning applications it received. The first step requires the reviewing state agency, the State's Single Point of Contact (SPOC), to provide its comments to DOL within 60 days after the deadline date for applications, conforming to 29 C.F.R. **§ 17.8(a)(2)**. The next three steps pertain to the timeframes within which **DOL** will forward the **SPOC's** comments to the applicant: the response by the applicant to DOL; and the time from the date of **DOL's** notice to the SPOC of its decision concerning the comments and response, and the implementation date. The balance of Part I

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<sup>5/</sup> The language of the regulation at 20 C.F.R. **§ 633.202(d)** differs from the preamble only in that the implementing regulations of the Executive Order are cited as being at "**30** C.F.R. Part **46**," [sic] and the last sentence **of** the regulatory subpart continues "instead of the usual 30-day period for review."

pertains to state planning estimates and the competitive point advantage an applicant will receive if it has the Governor's recommendation.

The **ALJ** held the deadline in the preamble of the Notice to be mandatory, and controlling with regard to an applicant's submission to the SPOC as well as to the Grant Officer. After discussing the preapplication and application filing dates, the **ALJ** states: "**I** interpret both of those provisions to relate to both the federal application and the state application." D. and O. at 10 (emphasis supplied). It should be noted that the applicant's submission to the SPOC is not an application to the state for funding, but rather a CODY of its federal funding application on which the SPOC is to comment.

Earlier in the decision, the **ALJ** characterizes the selection process for the MSF grants as a "**partnership**" effort between the state and Federal agencies.

In my judgment, the provisions of 29 C.F.R. Section **17.1(b)** set the tone for the congressional directive requiring the full participation of the instrumentalities of state government. ... **[I]**t seems clear to me that congressional intent mandates an **equal** partnership between both the federal and state governmental instrumentalities. ... I believe that the state's participation was considered by the Congress to be equally important as that of the federal government.

D. and O. at **9-10**.

To support his interpretation, the **ALJ** quotes at length from the Senate Report accompanying the Senate bill which was enacted

as JTPA. <sup>6/</sup> D. and O. at 9. The quotation entitled **"Federalism"** sets forth an enhanced role for the state and the Governor in determining service delivery areas and in the basic supervisory role over job training programs previously performed by the Federal government. This language, however, does not pertain to federally administered national programs under Title IV **of** JTPA, of which the MSF program is one. The last paragraph of the Federalism section, omitted from the **ALJ's** analysis, details as follows areas which remain within the Federal purview: **"[t]he federal government will be responsible for developing nationwide performance standards, operating national programs, conducting research, demonstration and evaluation activities, and monitoring state performance."** <sup>7/</sup>

As the Senate Report states, the Migrant and Seasonal Farmworker programs established under the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801, 873 (Supp. V 1981), were "retained" under JTPA. <sup>8/</sup> The only significant modification in JTPA directed the Secretary to strengthen the selection and administrative processes of MSF programs by the inclusion of personnel with particular competence in the

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<sup>6/</sup> S. Rep. No. 469, 97th Cong., 2d Sess. 3, reprinted in 1982 U.S. Code Cong. & Admin. News (USCCAN) 2636.

<sup>7/</sup> Id. at 2638 (emphasis supplied).

<sup>8/</sup> Id. at 2643.

field.<sup>9</sup> The JTPA language concerning the consultative process with state and local officials actually reduced the likely state and local role. <sup>10/</sup> Neither the Act nor the relevant legislative history is consistent with the **ALJ's** view that Congress intended MSF grantee selection to be a matter of partnership between the states and the DOL. <sup>11/</sup>

The Act and the pertinent regulations, reflecting the intent of Executive Order No. 12,372, 3 C.F.R. 197 **(1982)**, reprinted in 31 U.S.C. § 6506 app. at 512 **(1982)**, as amended, require the Grant Officer to consult with appropriate state officials. There is no dispute here that the Grant Officer consulted with the SPOC, **that KFP's** late filing did not interfere with the consultative process, and that the Grant Officer received the **SPOC's** comments in a timely fashion. D. and O. at 10. Ronald Ramsey, **KFP's** Executive Director, testified that the reason for

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<sup>9/</sup> See Section 402(e), JTPA, 29 U.S.C. § 1672(e). **"The Secretary is directed to take appropriate action to establish administrative procedures and machinery (including personnel having particular competence in this field) for the selection, administration, monitoring and evaluation of migrant and seasonal farmworker's employment and training programs authorized under this Act."**

<sup>10/</sup> Compare Section 402(d), JTPA, 29 U.S.C. § 1672(d) ("**... the Secretary shall consult with appropriate state and local officials**") with Section 303(e), CETA, 29 U.S.C. § 873(e) (Supp. V. 1981) ("**[i]n administering programs under this section, the Secretary shall consult with appropriate State and local officials and may enter into agreements with such officials to assist in the operation of such programs.**")

<sup>11/</sup> By contrast, it is clear that Congress did contemplate a **"partnership"** in the participation of local elected officials and representation from businesses, education and labor in private industry councils. See USCCAN at 2638; 29 U.S.C. §§ 1512-1513.



**KFP's** late filing with the SPOC was to respond to a request from the **SPOC's** manager, Mr. Bob Leonard, for additional material not included with the application submitted to the Grant Officer. The additional information was to assist the SPOC in its evaluation of **KFP's** grant application. Hearing Transcript at 71-73. The proffered reason for the delay was not contradicted by Lake Cumberland at the hearing or subsequently. Nor was there any prejudicial conduct toward any party. D. and O. at 10. Therefore, nothing of statutory or regulatory substance occurred that would occasion the setting aside of the Grant Officer's selection of KFP as the MSF grantee.

The **ALJ** erred in summarily dismissing the Grant Officer's argument that the state filing date was directory and not mandatory. Because of the Grant Officer's responsibility in selecting MSF grantees, this distinction is critical. The Grant Officer's responsibility to select a MSF grantee is singular. The **SPOC's** recommendation is not binding on the Secretary, although it provides information that facilitates a reasoned decision.. It was therefore error for the **ALJ** to elevate a procedural rule in a preamble concerning the filing of **KFP's** submission to the SPOC to a deadline which could act as a jurisdictional bar to consideration of the project by the Grant Officer. Ample case law establishes that an agency always has the discretion to relax procedural rules that are adopted to aid in the exercise of its discretion, barring a showing of substantial prejudice to a complaining party. American Farm

Lines v. Black Ball Freight Service, 397 U.S. 532, 538-39 (1969), citing NLRB v. Monsanto Chemical Co., 205 **F.2d** 763, 764 (8th Cir. 1953); Health Systems Agency of Oklahoma, Inc. v. Norman, 589 **F.2d** 486, 489-92 (10th Cir. 1978). Here, no such prejudice was shown.

Further, the record indicates that, had the SPOC received a funding proposal so late as to compromise its evaluation of the proposal, under an established procedure it could request the federal agency not to consider the proposal. <sup>12/</sup> As borne out by the record and by the **ALJ's** discussion, the eight day delay in the **SPOC's** receipt of **KFP's** application did not result in any problem for the **SPOC's** consideration of the application or the **SPOC's** timely response to the Grant Officer.

Moreover, I am mindful of a further consideration - program quality. The Congress intended the Department to fund only programs of proven effectiveness to meet the employment and training needs of the Nation's migrant and seasonal farmworker

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<sup>12/</sup> Letter from Lee Troutwine, Commissioner, to John G. Prather, Esq. dated December 18, 1989. Letter received and date stamped by the Office of Administrative Law Judges, December 21, 1989. Response to Interrogatory No. 24. See also Kentucky Intergovernmental Procedural Guide - Section 2 - Clearinghouse Notification. (The guide is used by the Kentucky State Clearinghouse which operates as the SPOC for JTPA grant applications. The Guide states that noncompliance with the timeframes is not a jurisdictional bar to review but is rather for the applicant's own best interest since the Clearinghouse reserves the right to recommend to a funding agency that a late submitted application not be considered for funding until the review is completed.)

population. <sup>13/</sup> Under JTPA, Federal personnel charged with the overall responsibility for selection and administration of the **MSF** programs were to have "particular competence in this **field**", and responsibility for these programs was retained by the **DOL**.<sup>14/</sup> The statutory goal is to provide a maximum benefit to the program's participants, and not to benefit putative service providers.

In this case, a panel of program specialists rated each application individually, and awarded the incumbent KFP 92.3 points out of a possible 100. Lake Cumberland was awarded 79 points. Even adding 5 points to Lake **Cumberland's** earned score because it is a governmental entity, **KFP's** earned total was almost 10% higher than Lake **Cumberland's** enhanced total. In reviewing the assessment of **KFP's** application by the Governor's office and various local organizations, 12 local agencies endorsed **KFP's** project as submitted, one conditionally endorsed the project, two had no comment, and only one, Lake Cumberland Community Services Organization, indicated that **KFP's** application was unsatisfactory. <sup>15/</sup>

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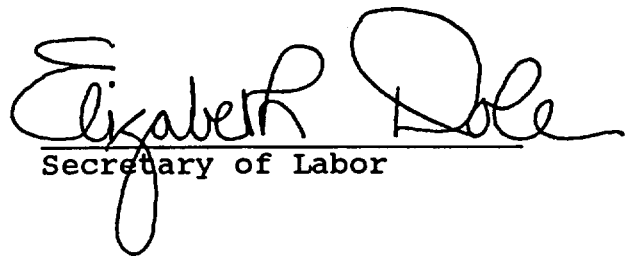
<sup>13/</sup> "The Secretary shall provide services to meet the employment and training needs of migrant and seasonal farmworkers through such . . . organizations as the Secretary determines to have .a previously demonstrated capability to administer effectively a diversified employability development program for migrant and seasonal farmworkers." 29 U.S.C. § 1672(c)(1) (emphasis added).

<sup>14/</sup> 29 U.S.C. § 1672(e).

<sup>15/</sup> Complainant's Exhibit 4, at 156-171.

It is my decision that the intent of the Congress in enacting JTPA is best served by affirming the Grant Officer's selection of the Kentucky Farmworker Programs, Inc. as the **MSF** grantee for Kentucky. Therefore, I REVERSE the **ALJ's** determination in this **case**.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

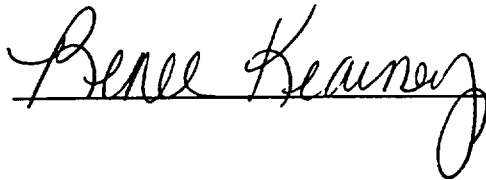
CERTIFICATE OF SERVICE

Case Name: Lake Cumberland Community Services Organization v.  
U.S. Department of Labor and Kentucky Farmworker  
Proarams, Inc.

Case No. : 89-JTP-20

Document : Final Decision and Order

A copy of the above-referenced document was sent to the following  
persons on NOV 20 1990.



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U.S.DEPARTMENTOF LABOR

SECRETARY OF LABOR  
WASHINGTON. D.C.

DATE: September 21, 1990  
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IN THE MATTER OF

LAKE **CUMBERLAND** COMMUNITY  
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RESPONDENT,

AND

KENTUCKY FARMWORKER PROGRAMS, INC.,

PARTY-IN-INTEREST.

BEFORE: THE SECRETARY OF LABOR

ORDER DENYING COMPLAINANT'S MOTION AND RENEWED MOTION  
TO ENFORCE REGULATIONS REQUIRING FUNDING SWITCHOVER

On July 11, 1990, I issued an order in this case asserting jurisdiction, establishing a briefing schedule, and staying the decision below of the Administrative Law Judge (ALJ). The Complainant, Lake Cumberland Community Services Organization, filed a **"Motion to Enforce Regulations Requiring Funding Switchover"** and supporting memorandum, received on July 31, 1990, and filed a **"Renewed Motion to Enforce Regulations Requiring Funding Switchover"** and supporting memorandum, received on September 12, 1990, requesting that I modify the July 11 Order asserting jurisdiction by lifting the stay of the **ALJ's** decision

of June 14, 1990, and permitting the **"switchover"** procedure to go forward. Complainant requests expedited review of its motions. On August 6, 1990, the Kentucky Farmworker Programs, Inc., the Party-in-Interest, filed an opposition to Complainant's motion. On August 13, the Grant Officer filed an opposition to Complainant's motion.

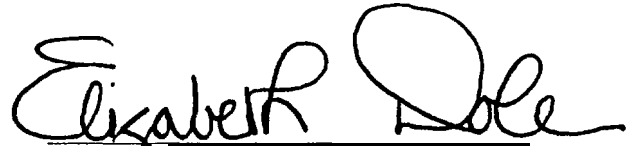
The Complainant misconstrues the applicability of 20 C.F.R. § 633.205(e) (1990), which pertains to the implementation of an **ALJ's** decision which is favorable to a successful non-selected applicant for a Migrant and Farmworker Program grant pursuant to the Job Training Partnership Act (JTPA or the Act), 29 U.S.C. §§ 1505-1781 (1982). That regulation would apply only if the **ALJ's** decision were a final adjudicatory act. My July 11 Order stayed the **ALJ's** decision, pending my final determination -- which will be the final adjudicatory act. The Act contemplates Secretarial review of ALJ determinations, 29 U.S.C. § 1576(b), and its provisions control all JTPA regulations including Section 633.205(e).

The Order asserting jurisdiction in this case established a briefing schedule for the parties. To the extent that Complainant's motions require consideration of the merits of this case, they will be considered and ruled on as appropriate in my final decision herein. Complainant's "Motion to Enforce



Regulations Requiring Funding **Switchover**" and "Renewed Motion to Enforce Regulations Requiring **Switchover**" are therefore DENIED.

SO ORDERED.

  
Secretary of Labor

Washington, D.C.

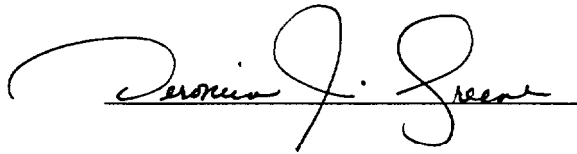
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Switchover

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